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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOHN POLACEK, Plaintiff/Appellant, v. UNITED FOOD GROUP, LLC, a California Limited Liability Company, Defendant/Appellee.	2 CA-CV 2010-0059 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20087614

Honorable Michael O. Miller, Judge

AFFIRMED

Dennis M. Breen III, PLC
By Dennis M. Breen, III — Tucson
Attorney for Plaintiff/Appellant

and

Slutes, Sakrison & Rogers, PC
By Tom Slutes — Tucson
Attorneys for Plaintiff/Appellant

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By Todd E. Hale — Tucson
Attorneys for Defendant/Appellee

B R A M M E R, Presiding Judge.

¶1 Appellant John Polacek appeals from the trial court's grant of summary judgment in favor of appellee United Food Group, LLC (United) on Polacek's wrongful termination action against it. Polacek argues the court erred in finding there was no genuine issue of material fact as to whether he was an at-will employee. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in its favor. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). Beginning in July 2001, United employed Polacek pursuant to a contract that stated his employment was for a term of three years. In June 2004 Polacek and United signed a letter extending the contract for three additional years. In early summer of 2006 American Capital Management purchased United and Polacek began reporting to supervisor Brian Levy.

¶3 In the spring of 2007, Polacek and Levy extended by letter agreement United's "agreement to employ [his] services through June 30, 2009." The letter included the following provision: "Unless terminated for cause, employee shall be paid a severance equal to 6 months employment or the balance of the term, whichever is less." In January 2008, Levy terminated Polacek's employment. United offered Polacek six months' severance in exchange for signing a letter releasing United from liability. Although Polacek refused to sign the letter, he received the severance pay.

¶4 Polacek sued United for breach of contract, asserting United had acted in bad faith when wrongfully terminating him and failing to pay him through June 30, 2009,

the date he asserts ended the contract period. Polacek sought payment for the remaining contract period, other past compensation, and treble damages. Polacek moved for partial summary judgment to determine whether the severance provision in the employment contract extension letter made his employment at-will and abrogated the contract's implied covenant of good faith and fair dealing, and whether unpaid wages under a wrongfully terminated employment contract are subject to treble damages.[1] United filed a cross-motion for partial summary judgment, asserting the contract, read as a whole, rendered Polacek an at-will employee and asking the trial court to determine as a matter of law that Polacek's termination and severance payment did not breach the employment agreement. The court denied Polacek's motion and granted United's, finding there was no genuine issue of material fact that Polacek was an at-will employee. This appeal followed.

Discussion

¶5 Polacek contends the trial court erred in granting summary judgment against him. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A trial court should grant a motion for summary judgment only "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the

[1]Polacek conceded an adverse decision by the trial court on the first issue would be dispositive of the case. Because the court did not reach the second issue, we do not address it here.

conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "On appeal from a summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998).

¶6 Polacek argues he was not an at-will employee because his employment agreement with United rebuts the at-will employment presumption found in the Employment Protection Act, A.R.S. §§ 23-1501 through 23-1502. Section 23-1501(2) states, in relevant part, as follows:

> The employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship.

Section 23-1501 places the burden on the employee to prove the employment is not severable at-will but instead falls within one of the statutory exceptions. *Taylor v. Graham County Chamber of Commerce*, 201 Ariz. 184, ¶ 37, 33 P.3d 518, 528 (App. 2001). The inquiry here, then, is whether Polacek's agreement with United satisfies the statute's exemption requirements. *See Johnson v. Hispanic Broadcasters of Tucson, Inc.*, 196 Ariz. 597, ¶ 4, 2 P.3d 687, 689 (App. 2000). In making such a determination, "we apply common law principles of contract interpretation and attempt to determine and give effect to the parties' intent." *Id.* ¶ 5.

¶7 A contract must be interpreted to give effect to every part, and every part must be read in relation to each other. *Gesina v. Gen. Elec. Co.*, 162 Ariz. 39, 780 P.2d 1380, *supp. op.*, 162 Ariz. 43, 45, 780 P.2d 1384, 1386 (App. 1988). A court will not construe one provision so that it renders another provision meaningless. *Norman v. Recreation Ctrs. of Sun City, Inc.*, 156 Ariz. 425, 428, 752 P.2d 514, 517 (App. 1988). When there are conflicting provisions in a contract, the contract should be construed so that the more specific provision qualifies the more general one. *Brisco v. Meritplan Ins. Co.*, 132 Ariz. 72, 75, 643 P.2d 1042, 1045 (App. 1982).

¶8 Polacek asserts the contract's provision "extending [the] agreement to employ [his] services through June 30, 2009" meets the requirements of § 23-1501(2) because it specifies the employment "shall remain in effect for a specified duration." The trial court implicitly disagreed, and concluded this provision was inadequate to constitute the agreement to be "for a specified duration," particularly because of the presence of the severance provision. Unlike the trial court, we find the term provision satisfies § 23-1501(2) such that Polacek's employment was no longer "severable at the pleasure of either the employee or the employer." We also conclude, however, that the severance provision of the contract implicitly provides United the right to terminate Polacek without cause, but expressly restricts that right by requiring payment of a severance upon such termination. *See* § 23-1501(2) (employment relationship severable at the pleasure of either party unless written contract "expressly restrict[s] the right of either party to terminate the employment relationship). The contract's term provision rebuts the statutory presumption that the "employment relationship is severable at the pleasure" of

either party, thereby restricting United's right to terminate under § 23-1501(2). The contract's severance provision, however, grants United a restricted right to terminate Polacek. This construction gives effect to both the term and severance provisions, rendering neither meaningless, instead determining the term provision is qualified by the severance provision. Because United complied with its restricted right to terminate Polacek by paying him in compliance with the severance provision, summary judgment in favor of United was appropriate.

¶9 Polacek also argues summary judgment was inappropriate because a genuine issue of material fact remains as to whether the severance provision applies to him. He asserts Levy told him the severance provision, although required by the company, did not apply to him. United argues the record contains no admissible evidence to support Polacek's assertion because it appears only in his statement of facts and not in the supporting affidavit. Thus, it argues, in the context of deciding a motion for summary judgment, the trial court properly could disregard it. Polacek argues he has complied with the rule because his statement of facts was verified.

¶10 Rule 56(c)(2), Ariz. R. Civ. P., requires a party filing a motion for summary judgment to set forth a separate statement of facts and "[a]s to each fact, the statement shall refer to the specific portion of the record where the fact may be found." "An 'affidavit' is a signed, written statement, made under oath before an officer authorized to administer an oath or affirmation in which the affiant vouches that what is stated is true." *In re Wetzel*, 143 Ariz. 35, 43, 691 P.2d 1063, 1071 (1984). We disagree with Polacek's assertion he complied with the rule and that his statement of facts "was a sworn statement

as to its accuracy no less binding than his affidavit." The verification portion of Polacek's statement of facts did not contain a notary's jurat. *See* A.R.S. § 41-311(6) ("'Jurat' means a notarial act in which the notary certifies that a signer . . . has taken an oath or affirmation vouching for the truthfulness of the signed document."); *see also* A.R.S. § 12-2221(A) (oath administered to "best awaken the conscience and impress the mind," and is "taken upon the penalty of perjury"). Because Polacek did not verify the statement of facts under oath before a notary public, the statement of facts cannot constitute an affidavit.

¶11 Not all affidavits and other declarations, however, must be sworn in order to meet requirements in the Arizona Rules of Civil Procedure. Rule 80(i), Ariz. R. Civ. P., provides an exception for unsworn declarations:

> Wherever . . . any matter is required or permitted to be supported, evidenced, established, or proved by the sworn written declaration, verification, certificate, statement, oath, or affidavit of the person making the same . . . , such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn written declaration, certificate, verification, or statement subscribed by such person as true under penalty of perjury, and dated . . . .

Polacek also failed to comply with this rule, because his unsworn declaration in his statement of facts was not made under penalty of perjury as required by Rule 80(i), Ariz. R. Civ. P.

¶12 In sum, Polacek's assertion Levy told him the severance provision did not apply to him was not contained in his sworn affidavit, and his statement of facts cannot substitute for that omission. Polacek did not comply with Rule 56(c)(2), Ariz. R. Civ. P.,

because Levy's alleged statement was not supported by a fact properly contained in the record. Accordingly, whether the severance provision did or did not apply to Polacek was not a genuine issue of material fact before the trial court that would preclude it from granting United summary judgment.

Disposition

¶13 For the reasons stated, we affirm the trial court's grant of summary judgment in favor of United. United requests an award of attorney fees on appeal pursuant to A.R.S. § 12-341.01, which permits a discretionary award of reasonable attorney fees to the successful party in an action arising out of contract. In our discretion, we deny United's request.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge